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Nov. 20. 1879

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~298~~ 75

THE PITTSBURGH GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF PITTSBURGH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 31, 1876.

# SUPREME COURT OF THE UNITED STATES.

## No. 298.

THE PITTSBURGH GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF PITTSBURGH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 In the supreme court of Pennsylvania for the western district.

THE PITTSBURGH GAS COMPANY, PLAINTIFF in error and below,
*vs.*
THE CITY OF PITTSBURGH, DEFENDANT IN ERROR and below.

To the honorable justices of the Supreme Court of the United States:

Your petitioner, the above-named plaintiff in error, respectfully represents unto the court that the judgment of said court in the above case is final and not interlocutory; that your petitioner is advised that there is error in said judgment as follows, to wit, in this:

First. The court below erred in entering judgment in favor of the defendant in error on the case stated; and

Second. The court below erred in affirming the judgment of the court of common pleas of Allegheny County, Pennsylvania, which judgment is as follows:

"JULY 15, 1871.—Judgment is directed to be entered in favor of defendant on within case stated."

2 And other manifest errors have intervened in the judgment of said court to the prejudice of your petitioner.

Wherefore your petitioner prays that a writ of error may be allowed in this cause, so that the said judgment may be re-examined in this honorable court.

J. W. MOORE AND
EDW. A. NEWMAN,
*Att'ys for Plaintiff in Error.*

Writ of error allowed.
Oct. 10, 1876.

W. STRONG, *J.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between the Pittsburg Gas Company, plaintiff in error, and the City of Pittsburg, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their

4 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears: We, being willing that error, if any had been, should be duly corrected, and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the nineteenth of October, in the year of our Lord one thousand eight hundred and seventy-six.

D. W. MIDDLETON,
*Clerk of the Supreme Court of the United States.*

Allowed by—

W. STRONG, *J.*

Oct. 19, 1876.

5 I, Thomas S. Bigelow, city attorney of the city of Pittsburgh, State of Pennsylvania, do hereby acknowledge to have received a copy of the within writ of error this 20th of Oct., 1876.

THOS. S. BIGELOW,
*Att'y for City of Pittsburgh.*

COMMONWEALTH OF PENNSYLVANIA, *ss:*

To the honorable the Judges of the Supreme Court of the United States:

The record and process within mentioned, with all things touching the same, before the judges within named, at the day and place within contained, in a certain record to this writ annexed, we do certify and send as within we are commanded.

DANIEL AGNEW, [SEAL.]
*Chief Justice of Pennsylvania.*

(Indorsed:) 160. O. & N. T., 1871. Pittsburgh Gas Co. vs. City of Pittsb'g. Filed Oct. 21, '76.

6, 7 The United States of America to the City of Pittsburg, greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein the Pittsburg Gas Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William Strong, associate justice of the Supreme Court of the United States, this nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

W. STRONG.

8 I, Thomas S. Bigelow, city attorney of the city of Pittsburgh, in the State of Pennsylvania, do hereby acknowledge to have received a copy of the within citation this 20th Oct., 1876.

THOS. S. BIGELOW,
*Att'y for City of Pittsburgh.*

(Indorsed:) 160. O. & N. T., 1871. Pittsburgh Gas Co. vs. City of Pittsb'g. Filed Oct. 21, '76.

9 Know all men by these presents that we, David Hostetter, of Allegheny City, Allegheny Co., Penna., and John Daub, of Allegheny County, Penna., are held and firmly bound unto the City of Pittsburg in the full and just sum of one thousand dollars, to be paid to the said the City of Pittsburgh, its certain attorney; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals, and dated this seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a supreme court of the State of Pennsylvania, in a suit depending in said court between the Pittsburg Gas Company, plaintiff in error, and the City of Pittsburg, defendant in error, judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Pittsburg, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID HOSTETTER. [L. S.]
JOHN DAUB. [L. S.]

Sealed and delivered in presence of—
W. H. McCLELLAND,
JNO. W. MACDONALD.

Acknowledged before me.
[SEAL.]
H. D. GAMBLE.
*Clerk U. S. C. Court, W. D. of Pa.*

Approved by—

10 Bond & sureties approved Oct. 19, 1876.

W. STRONG.

I, H. D. Gamble, clerk of the circuit court of the United States for the western district of Pennsylvania, do certify that the within-named obligators are known to me to be perfectly good and responsible for the sum within mentioned.

October 17, 1876. H. D. GAMBLE.

11 Supreme court of Pennsylvania, in and for the western district. October and November term, 1871.

BARTON PITTSBURGH GAS CO., PL'FF IN ERROR & below,
*vs.*
SLAGLE CITY OF PITTSBURGH.
} No. 160.

Writ of error to the court of common pleas of Allegheny County. At No. 670, June T., 1871.

Precipe and affidavit filed and writ issued, rule, &c., Aug't 29, 1871.
Record returned, Oct. 2, 1871.
Errors assigned, Sept. 30, 1871.

Argued, Nov'r. 6, 1871.
Nov'r. 13th, 1871. Judgment affirmed, opinion per curiam.
Oct. 21, 1876. Writ of error and citation from the Supreme Court of the United States and citation, with proof of service of the same on d'f't in error, filed.

Costs: Writ, Treas. McC. pd., $6.00; att'y S., 4.00; pro., R., 8.00; total, $ .
Rec. sent down & fee ch'd. T. J. R., pro.
Record ret'd to this office by Pine, Oct. 7, '76. J. B. S., pro.
I, J. B. Sweitzer, pro. S. C. W. D., do hereby certify that the above is a true and correct transcript of the docket entries of all proceedings in said court in said cause, No. 160, of October & November term, 1871, and that hereto attached is a full and true copy of the record in said cause, as the same remains on file in my office.
Witness my hand and the seal of said court.
Oct. 21, 1876.

J. B. SWEITZER,
*Prothonotary.*

12 In the supreme court of Pennsylvania for the western district, ss.

PITTSBURGH GAS COMPANY, PL'FF IN ERROR & below, *vs.* THE CITY OF PITTSBURGH. } No. 160 Oct. & Nov. term, 1871.

Error to court of common pleas of Allegheny Co.

STATE OF PENNSYLVANIA,
*County of Allegheny, ss :*

In the court of common pleas, June term, 1870.

THE PITTSBURGH GAS CO. *vs.* THE CITY OF PITTSBURGH. } No. 670. May 1, 1871.

Case stated filed.
July 15, 1871.—Judgment is ordered to be entered for the defendant on the case stated.
August 29, 1871.—Writ of error filed and record sent up.
13 From the record. Attest:

JOSEPH ROSS,
*Proth'y.*

PENNSYLVANIA,
*Allegheny County ss :*

In court of common pleas.

THE PITTSBURGH GAS COMPANY *vs.* THE CITY OF PITTSBURGH. } No. June T., 1871.

It is hereby agreed between the parties to the above suit that the questions at issue between said parties shall be submitted to the court

for their opinion upon the following statement of facts, in the nature of a special verdict, viz:

The Pittsburgh Gas Company was incorporated by the legislature of Pennsylvania, by an act approved the 16th day of March, 1848, the said city of Pittsburgh being the owner of six hundred and ninety-eight
14 shares of the value of fifty dollars each, and having power to elect six of the twelve trustees of said company. That by a supplement to said act, approved the 31st day of January, 1860, it was provided as follows, viz:

SEC. VII. "That whenever the provisions of this act shall have been accepted by the stockholders of said company and the councils of said city corporation, as hereinafter provided, the mayor, aldermen, and citizens of Pittsburgh shall forthwith cease to be stockholders in said company, and all the stock held by the city corporation or standing in its name on the books of the said company shall be surrendered to the company, and the said city corporation shall have no further right to or interest in said stock; but the same shall become a part of the funds of the company, and be distributed among the stockholders pro rata."

SEC. VIII. "That the said company shall, at the cost of the city corporation, construct, erect, and keep in order all such public lamps and burners in the streets as the city councils may direct, and shall also furnish all the gas required for consumption in the public street-lamps, market houses, council-chambers, and public offices of the city, at the following rates, that is to say: Any quantity not exceeding twelve
15 and one-half millions cubic feet of gas annually, free of charge, and any excess over that quantity that may be required annually at a rate not exceeding seventy-five cents for each one thousand cubic feet of gas in such excess. The price of such excess so furnished, together with the cost of constructing, erecting, and keeping in order the public lamps and burners in the streets, shall be paid to the company quarterly by the city corporation."

In pursuance of said act the councils of the city of Pittsburgh, on the 3rd day of Feb'y, 1860, passed an ordinance as follows:

SEC. I. "That the provisions of an act of assembly approved the thirty-first day of January, A. D. one thousand eight hundred and sixty, entitled 'A supplement to an act to incorporate the Pittsburgh Gas Company,' approved the sixteenth day of March, A. D. one thousand eight hundred and forty-eight, be and the same are hereby approved and accepted by the councils of said city, and that a copy of this ordinance, properly authenticated by the presidents and clerks of councils, be delivered to the said gas company, and the mayor of the city of Pittsburgh is hereby authorized and instructed to make a
16 proper surrender to the Pittsburgh Gas Company of all interest and ownership of said city in any stock or other property and effects in said gas company. That all ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

And in pursuance of said act and ordinance the mayor of said city made and executed a surrender of the stock of said city, which was accepted by said company upon the terms of said act of assembly, the said gas company furnished the gas in accordance with said agreement, and during the six months ending January 1, 1870, furnished
feet of gas, including 6,250,000 feet to be furnished free, under said act of assembly and agreement. By the 94 sec. of an act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved

June 30th, 1864, and a supplement thereto, approved July 18th, 1866, it was provided as follows, viz:

§ 3. Amendment to *to* sec. 94. On gas, illuminating, made of coal, wholly or in part, or any other material, when the product shall
17 not be above two hundred thousand cubic feet per month, a tax of ten cents per one thousand cubic feet; when the product shall be above two and not exceeding five hundred thousand cubic feet per month, a tax of fifteen cents per one thousand cubic feet; when the product shall be above five hundred thousand and not exceeding five millions of cubic feet per month, a tax of twenty cents per one thousand cubic feet; when the product shall be above five millions, a tax of twenty-five cents per one thousand cubic feet; and the general average of the monthly product for the year preceeding the return required by law shall determine the rate of tax herein imposed. And where any gas works have not been in operation for the next year preceeding the return as aforesaid, then the rate shall be determined by the estimated average of the monthly product: Provided, that the product required to be returned by law by any gas company shall be understood to be, in addition to the gas consumed by said company or other party, the product charged in the bills actually rendered by the gas company during the month preceeding the return; and until the thirtieth day of April, eighteen hundred and sixty-seven, all gas companies whose price is fixed by law are authorized to add the tax herein
18 imposed to the price per thousand feet on gas sold; and all such companies which have heretofore contracted to furnish gas to municipal corporations, are, in like manner, and for the same period, authorized to add such tax to such contract price: Provided, further, That all gas furnished for lighting street lamps, or for other purposes, and not measured, and all gas made for and used by any hotel, inn, tavern, and private dwelling-house, shall be subject to tax whatever the amount of product, and may be estimated, and if the returns in any case shall be understated or underestimated, it shall be the duty of the assistant assessor of the district to increase the same as he shall deem just and proper: And provided further, That gas companies located within the corporate limits of any city or town, whether in the same district or otherwise, or so located as to compete with each other, shall pay the rate of tax imposed by law upon the company having the largest production: And provided further, That coal tar and ammoniacal liquor produced in the manufacture of illuminating gas, and the products of redistillation of coal tar, and the products of the manufacture of am-
19 moniacal liquor thus produced, shall be exempt from tax." Also, a further supplement to said act, passed March 2, 1867, being an amendment to the 94 section of said act of July 18, 1866, in manner following, viz: "By striking out in the paragraph relating to gas the words, and until the thirtieth day of April, 1867." The city paid the amount of bill for gas and the tax upon all gas furnished up to January 1, 1871, except the amount of tax on 6,250,000 feet of gas which it claimed said gas company had contracted to furnish free of charge. The tax on said 6,250,000 feet of gas, amounting to the sum of $1,562.50, was paid by the said Pittsburgh Gas Company to the United States. If, under the above state of facts, the court is of opinion that the said plaintiff is entitled to recover, judgment to be entered in favor of the plaintiff for the sum of $1,562.50, with interest from January 1st, 1871, with costs of suit; but if the court shall be of opinion that the plaintiff is not entitled to recover, judgment to be entered for defendant for costs,

with right for either party to sue out a writ of error from the supreme court of Pennsylvania and from the Supreme Court of the United States.

It is also agreed that *that* the acts of Congress, acts of the legislature of the State of Pennsylvania, and the ordinances of the city of Pittsburgh referred to above, shall be used in evidence on the argument, and the same shall be made part of this case stated.

J. F. SLAGLE,
*Att'y for Def't.*
JOHN BARTON,
*Att'y for Pittsburgh Gas Company.*

(Endorsement:) No. 670, June term, 1871. The Pittsburgh Gas Company vs. The City of Pittsburgh. Agreement and case stated. Filed May 1st, 1871. Barton for pl'ff. Slagle for d'f't.

JULY 15, 1871.—Judgment is directed to be entered for d'f't on within case stated. To which order of court pl'ff's att'y excepts, and this bill sealed.

By the court.

E. H. STOWE. [SEAL.]

In the supreme court of Pa., western district.

ALLEGHENY COUNTY, *ss:*

THE PITTSBURGH GAS CO., PL'FF IN ERROR & below,
*vs.*
THE CITY OF PITTSBURGH, D'F'T BELOW AND in error.

Issue writ of error to the court of common pleas of Allegheny County, to remove the record and judgm't in No. 670, June term, 1871, returnable to next term.

JNO. BARTON,
*Att'y for P. in Error.*

To THOS. J. KEENAN,
*Pro. S. C.*

Aug. 29, '71.

WEST. DIS'T OF PENN'A, *ss:*

Wm. H. McClelland, treas'r of pl'ff in error, being duly sworn, saith on oath that this writ of error is not sued out for the purpose of delay.

W. H. MCCLELLAND,
*Treasurer P'gh Gas Co.*

Sw. & sub'd Aug. 29, '71.

THOS. J. KEENAN, *Pro.*

(Endorsements:) No. 160, O. & N. T., 1871. The Pittsburgh Gas Co., pl'ff below & in error, vs. City of Pittsburgh. Error to C. P. of Allegheny Co. Prec. & aff't filed & writ issued Aug. 29, '71. Rule, &c. $6 treas. McC. p'd.

Supreme court, western district. Oct. & Nov. term, 1871.

PENNSYLVANIA,
*Allegheny County, ss:*

THE PITTSBURGH GAS CO., PL'FF IN ERROR & below, *vs.* THE CITY OF PITTSBURGH. } No. 160.

And now, Sept. 30, 1871, pl'ff in error, by its counsel, assigns the following specifications of error to the ruling of the court below in this case, to wit:

*Assignments of error.*

1. The court below erred in entering judgment in favor of the defendant on the case stated, and in making the order of July 15, 1871, to wit, July 15, 1871. Judgment is directed to be entered in favor of defendant on within case stated. To which order of court plaint-
23 iff's counsel excepts, and this bill is sealed.
By the court.

E. H. STOWE. [SEAL.]

JOHN BARTON,
*Atty. for Pl'ff in Error.*

(Endorsements:) No. 160, Oct. & Nov. term, 1871. The P'gh Gas Co. vs. The City of P'gh. Assignment of errors. Filed Sept. 30, '71.

24 WESTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the judges of the court of common pleas for the county of Allegheny, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between The Pittsburgh Gas Company, pl'ff, and The City of Pittsburgh, d'f't, No. 670, June term, 1871, as it is said, manifest error hath intervened, to the great damage of the said pl'ff, as by complaint of the same pl'ff we have received information. We, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seal, distinctly and openly, you have before the judges of the supreme court of the said commonwealth, at a supreme court to be held at Pittsburgh, in and for the western district of the said commonwealth, on the 1st Monday of Oct. next, and this writ, that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our customs ought.

Witness the honorable James Thompson, LL. D., chief justice of our said supreme court, at Pittsburgh, the 29th day of Aug., in the year of our Lord one thousand eight hundred and 71, and of the commonwealth the 96th.

[SEAL.]

THOS. J. KEENAN,
*Prothonotary of Western District.*

Allowed by—

25 COMMONWEALTH OF PENNSYLVANIA,
*County of Allegheny, ss:*

To the honorable the judges of the supreme court:

The record and process within mentioned, with all things touching the same, before the judges within named, at the day and place within contained in a certain record to this writ annexed, we do certify and send as within we are commanded.

EDWARD H. STOWE, [SEAL.]
*Associate Law Judge.*

(Indorsed:) No. 160 of Oct. and Nov. term, 1871. Supreme court. Copy. Pittsburgh Gas Co., pl'ff in error & below, vs. The City of Pittsburgh.

Writ of error to the com. pleas of Allegheny Co., at No. 670 of June T., 1871, returnable to 1st Monday of Oct., 1871.

Precipe, affidavit, and recognizance filed and writ issued, Aug. 29th, 1871.

"Rule to appear and plead at return of writ."

N. B.—20 days' notice to the party or her counsel below is necessary to compel an appearance.

THOS. J. KEENAN,
*Pro. W. D.*

Oct. 2, '71, ret'd.

Filed Aug. 29, 1871.

BARTON,
*Att'y for P. in E.*

$6 p'd by sec'y, McC'd.

(Indorsement on cover:) No. 298. The Pittsburgh Gas Company, plaintiff in error, vs. The City of Pittsburgh. Pennsylvania sup. court. Filed 31st October, 1876.

REC. 298—2

C

# Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 75.

THE PITTSBURGH GAS COMPANY,
PLAINTIFF IN ERROR,

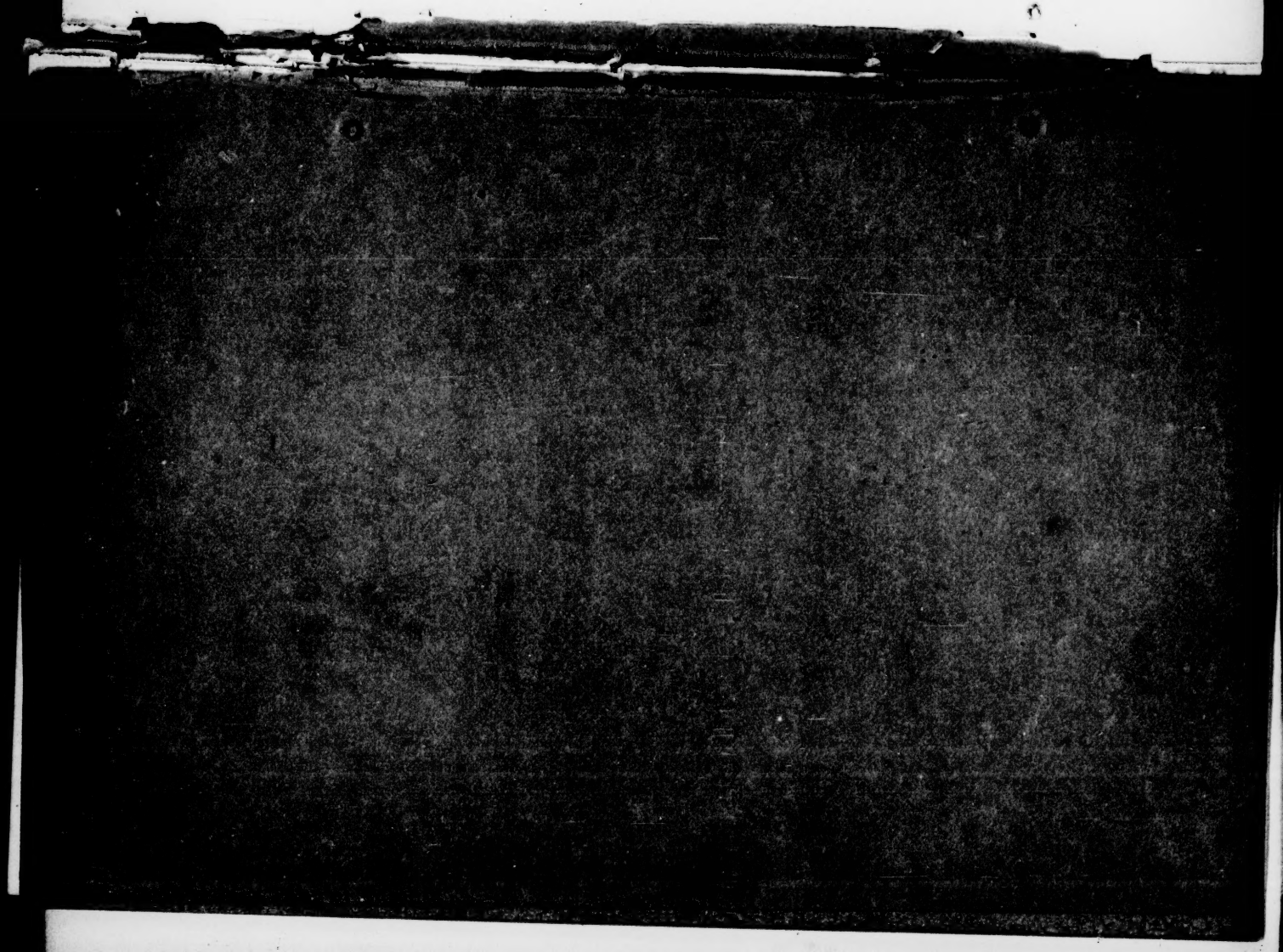
*VS.*

THE CITY OF PITTSBURGH,
DEFENDANT IN ERROR.

## BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. RAY,
EDWARD A. NEWMAN,
*For Plaintiff in Error.*

C. E. Hall, Printer, 511 Ninth Street.



# Supreme Court of the United States.

OCTOBER TERM, 1879.

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No. 75.

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THE PITTSBURGH GAS COMPANY,
PLAINTIFF IN ERROR,

*VS.*

THE CITY OF PITTSBURGH,
DEFENDANT IN ERROR.

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## STATEMENT.

The plaintiff in error, having furnished to the city of Pittsburgh, the defendant in error, during the six months ending January 1, 1870, a large quantity of gas, including 6,250,000 feet, the city refused to refund to the plaintiff in error the tax upon said last-named quantity of gas, which had been imposed and collected by the United States from said plaintiff in error. Thereupon both said parties at the June term, 1871, prepared and submitted to the Court of Common Pleas of Allegheny County, Pennsylvania, the following agreed statement of facts:

"It is hereby agreed between the parties to the above

suit that the questions at issue between said parties shall be submitted to the court for their opinion upon the following statement of facts, in the nature of a special verdict, viz:

The Pittsburgh Gas Company was incorporated by the legislature of Pennsylvania, by an act approved the 16th day of March, 1848, the said city of Pittsburgh being the owner of six hundred and ninety-eight shares of the value of fifty dollars each, and having power to elect six of the twelve trustees of said company. That by a supplement to said act, approved the 31st day of January, 1860, it was provided as follows, viz:

SEC. VII. 'That whenever the provisions of this act shall have been accepted by the stockholders of said company and the councils of said city corporation, as hereinafter provided, the mayor, aldermen, and citizens of Pittsburgh shall forthwith cease to be stockholders in said company, and all the stock held by the city corporation or standing in its name on the books of the said company shall be surrendered to the company, and the said city corporation shall have no further right to or interest in said stock; but the same shall become a part of the funds of the company, and be distributed among the stockholders pro rata.'

SEC. VIII. 'That the said company shall, at the cost of the city corporation, construct, erect, and keep in order all such public lamps and burners in the streets as the city councils may direct, and shall also furnish all the gas required for consumption in the public street-lamps, market houses, council-chambers, and public offices of the city, at the following rates, that is to say: Any quantity not exceeding twelve and one-half millions cubic feet of gas annually, free of charge, and any excess over that quantity that may be required annually at a rate not exceeding seventy five cents for each one thousand cubic feet of gas in such excess. The price of such excess so

furnished, together with the cost of constructing, erecting, and keeping in order the public lamps and burners in the streets, shall be paid to the company quarterly by the city corporation.'

In pursuance of said act the councils of the city of Pittsburgh, on the 3rd day of Feb'y, 1860, passed an ordinance as follows:

SEC. I. 'That the provisions of an act of assembly approved the thirty-first day of January, A. D., one thousand eight hundred and sixty, entitled 'A supplement to an act to incorporate the Pittsburgh Gas Company,' approved the sixteenth day of March, A. D. one thousand eight hundred and forty-eight, be and the same are hereby approved and accepted by the councils of said city, and that a copy of this ordinance, properly authenticated by the presidents and clerks of councils, be delivered to the said gas company, and the mayor of the city of Pittsburgh is hereby authorized and instructed to make a proper surrender to the Pittsburgh Gas Company of all interest and ownership of said city in any stock or other property and effects in said gas company. That all ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.'

And in pursuance of said act and ordinance the mayor of said city made and executed a surrender of the stock of said city, which was accepted by said company upon the terms of said act of assembly, the said gas company furnished the gas in accordance with said agreement, and during the six months ending January 1, 1870, furnished feet of gas, including 6,250,000 feet to be furnished free, under said act of assembly and agreement. By the 94 sec. of an act of Congress entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, and a supplement thereto, approved July 18th, 1866, it was provided as follows, viz:

§ 3. Amendment to sec. 94. 'On gas, illuminating, made of coal, wholly or in part, or any other material, when the product shall not be above two hundred thousand cubic feet per month, a tax of ten cents per one thousand cubic feet; when the product shall be above two and not exceeding five hundred thousand cubic feet per month, a tax of fifteen cents per one thousand cubic feet; when the product shall be above five hundred thousand and not exceeding five millions of cubic feet per month, a tax of twenty cents per one thousand cubic feet; when the product shall be above five millions, a tax of twenty-five cents per one thousand cubic feet; and the general average of the monthly product for the year preceding the return required by law shall determine the rate of tax herein imposed. And where any gas works have not been in operation for the next year preceding the return as aforesaid, then the rate shall be determined by the estimated average of the monthly product: Provided, that the product required to be returned by law by any gas company shall be understood to be, in addition to the gas consumed by said company or other party, the product charged in the bills actually rendered by the gas company during the month preceding the return; and until the thirtieth day of April, eighteen hundred and sixty-seven, all gas companies whose price is fixed by law are authorized to add the tax herein imposed to the price per thousand feet on gas sold; and all such companies which have heretofore contracted to furnish gas to municipal corporations, are, in like manner, and for the same period, authorized to add such tax to such contract price: Provided, further, That all gas furnished for lighting street lamps, or for other purposes, and not measured, and all gas made for and used by any hotel, inn, tavern, and private dwelling-house, shall be subject to tax whatever the amount of product, and may be estimated, and if the returns in any case shall be understated or underestimated, it shall be the duty

of the assistant assessor of the district to increase the same as he shall deem just and proper: And provided further, That gas companies located within the corporate limits of any city or town, whether in the same district or otherwise, or so located as to compete with each other, shall pay the rate of tax imposed by law upon the company having the largest production: And provided further, That coal tar and ammoniacal liquor produced in the manufacture of illuminating gas, and the products of redistillation of coal tar, and the products of the manufacture of ammoniacal liquor thus produced, shall be exempt from tax.' Also, a further supplement to said act, passed March 2, 1867, being an amendment to the 94 section of said act of July 18, 1866, in manner following, viz: 'By striking out in the paragraph relating to gas the words, and until the thirtieth day of April, 1867.' The city paid the amount of bill for gas and the tax upon all gas furnished up to January 1, 1871, except the amount of tax on 6,250,000 feet of gas which it claimed said gas company had contracted to furnish free of charge. The tax on said 6,250,000 feet of gas, amounting to the sum of $1,562.50, was paid by the said Pittsburgh Gas Company to the United States. If, under the above state of facts, the court is of opinion that the said plaintiff is entitled to recover, judgment to be entered in favor of the plaintiff for the sum of $1,562.50, with interest from January 1st, 1871, with costs of suit; but if the court shall be of opinion that the plaintiff is not entitled to recover, judgment to be entered for defendant for costs, with right for either party to sue out a writ of error from the Supreme Court of Pennsylvania and from the Supreme Court of the United States. It is also agreed that the acts of Congress, acts of the legislature of the State of Pennsylvania, and the ordinances of the city of Pittsburgh referred to above shall be used in evidence on the argument, and the same shall be made part of this case stated."

Upon which case stated, the Common Pleas Court, on the 15th day of July, 1871, directed a judgment for the defendant in error. To which judgment the plaintiff in error excepted and sued out a writ of error in the Supreme Court of Pennsylvania. On the 13th day of November, 1871, the Supreme Court of Pennsylvania affirmed the judgment of the Common Pleas, and on the 10th of October, 1876, this writ of error was allowed in the Supreme Court of the United States. And the plaintiff in error makes the following assignment of error:

First.—The court below erred in entering judgment in favor of the defendant in error on the case stated, and

Second.—The court below erred in affirming the judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, which judgment is as follows: "July 15, 1871. Judgment is directed to be entered in favor of the defendant on within case stated."

Third.—The court below erred in entering a judgment for the defendant in error on the case stated, when it should have entered a judgment in favor of the plaintiff in error and against the defendant in the sum of $1,562.50, with interest from January 1, 1871.

Fourth.—The court below erred in affirming the judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, when it should have reversed the same, and in pursuance of the 94 section of the act of Congress approved June 30, 1864, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," and the supplement thereto, approved July 18, 1866, and the amendment of March 2, 1867, should have directed a judgment in favor of the plaintiff in error in the sum of $1,562.50, and interest thereon from the 1st day of January, 1871, against the defendant in error

## BRIEF.

That a federal question can be presented in this court, upon a writ of error to a State court, where such question arises upon a case stated, has been repeatedly decided. Such was the ruling in Campbell vs. Boynton, 21st How. 226, where it was said, "And by the established and familiar rules and principles which govern common-law proceedings, no question of law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, and judgment in the cause), unless the facts are found by a jury by a general or special verdict, or *are admitted by the parties upon the case stated* in the nature of a special verdict stating the facts, and referring the question of law to the court."

In Aldrich vs. Ætna Co., 8 Wall., 491, it was held that "a voluntary submission on an agreed statement of facts to a state court, under permission of the State statute, did not defeat the jurisdiction of this court."

The case of the United States vs. Eliason, 16 Peters, 291, decided, after reviewing the prior cases in this court, "that a writ of error lies when a decision has been rendered upon an agreed case, where the practice of the court in the State where the decision was pronounced, recognized such a presentation of a question."

It would seem sufficient that the Supreme Court of Pennsylvania has thus recognized the practice by proceeding to final judgment upon the writ of error in this case. But the practice is established in Pennsylvania by numerous decisions.

See Troubat and Haly, Penn. Practice, vol. 1, p. 587.
Da Costa vs. Guien, 7 Serg. & Rawle, 461.
Whitesides vs. Russell, 8 Watts & Sergt., 44.
Holmes vs. Wallace, 10 Wright, 266.
Berks County vs. Pile, 6 Harris, 493.

The Federal question presented by this record, is the right claimed by the plaintiff in error to recover from the defendant in error the amount of tax paid by the former to the United States as internal revenue tax upon 6,250,000 feet of gas furnished to said defendant. This claim upon the facts stated, rests alone upon the 94 section of an act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and a supplement thereto approved July 18, 1866; 3d section, amendment to section 94; also a further supplement to said act, passed March 2, 1867. The section of the act relied on, and the supplement thereto, and the amendment of said supplement, are all set forth in full in the agreed statement of facts.

It is insisted by the plaintiff in error that the plain purpose of the act was to tax the consumer of gas, and the collection from the manufacturer in the first instance was simply a matter of convenience to the government. That for this reason it was declared that "all gas companies whose price is fixed by law are authorized to add the tax herein imposed to the price per thousand feet on gas sold, and all such companies which have heretofore contracted to furnish gas to municipal corporations, are in like manner and for the same period authorized to add such tax to such contract price."

All companies not so governed by a fixed contract, would of course include the tax on the sale of the gas. Now as this statute did not attempt to aid in the collection of the agreed price of the gas furnished, but concerned itself alone with the collection of the amount of the tax imposed, it could matter nothing in the view of the law what the contract price was. The entire purpose of the statute was to impose the tax upon the consumer, this being in the legislative judgment the just and equitable policy, and it would seem a very narrow and restricted view that would defeat

this legislative intent by exacting the ascertainment of an actual sum as a contract price before effect is given to the law. The true question is, Has a limit been fixed by law or by contract, which, without this legislation existing, would forbid that the tax imposed should be exacted by the manufacturer from the consumer? If so, the manufacturer is within the intent of the law, and he is not to be excluded from its benefit upon any rigid rule of interpretation applied to the language used in the statute. Language is but used in a statute to express the legislative will, and that will once clearly expressed, is not to be thwarted by the very instrument employed to make it known. In this view no violence is done to the language used, and the purpose of the act is carried into effect by holding that the words "contract price" in the act are equivalent to the words "the limit fixed by the contract." If that limit be that a certain quantity is to be furnished "free," still the manufacturer can collect from the consumer the tax imposed by the government. Under this construction of the law, the Supreme Court of Pennsylvania committed error in the denial of the right secured to the plaintiff under the statute.

But if this interpretation of the act is not correct, the court will find upon an examination of the facts as agreed upon, that a price has been fixed and is annually paid for the gas furnished. This examination this court must make under its jurisdiction over the cause. In Republican River Bridge Company vs. Kansas Pacific Railroad Company, 2 Otto, 315, it is said, "In chancery cases, or in any other class of cases, where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right so set up under the act of Congress." How much clearer is the duty of the court where the facts are agreed upon in

the record, to look into these facts, to determine the validity of the claim so set up under the act of Congress.

An examination of those facts justifies one of two conclusions, either of which require the recognition of the claim made by the plaintiff in error.

It is clear that the amount of gas to be furnished under the law, and the contract made by the acceptance by both plaintiff and defendant of the provisions of the statute, was to be very largely in excess of the amount the company were required to furnish free. Indeed, if this does not sufficiently appear from the statement of facts, this court will take judicial notice of the large population of the city of Pittsburgh, and the statistical ascertained rate of consumption of illuminating gas by such a population. These are of that class of facts, geographical and scientific, of which courts no longer assume to be uninformed. And with this fact in view it is equally apparent that for such excess a price was fixed, which was determined, regard being had to this quantity so furnished free; and it may therefore be fairly considered as a price apportioned upon the entire amount of gas furnished. Thus, assuming that 100,000,000 feet of gas would be required per year, the requirement that 87,500,000 feet should be furnished at seventy-five cents per thousand feet, and the rest free, was simply reducing the contract price of the entire amount twelve and one-half per cent. below seventy-five cents per thousand feet. Under this view the "contract price" of the entire amount furnished annually could be determined, and the tax added, thus bringing the claim within the severest interpretation of the statute.

But it is unnecessary to insist upon this theory even to meet so forced an exposition of the statute.

It is plain that the consideration or "contract price" for this 6,250,000 feet of gas furnished semi-annually, was the transfer of 698 shares of the company stock, worth $34,900.00, by the city to the gas company, and the surrender

by the city of the right to elect six of the twelve trustees to manage the affairs of the gas company. The annual dividends upon this 698 shares of stock, surrendered by the city to the gas company, and which the legislation required, as the agreed statement recites "to be distributed among the stockholders pro rata," paid to each stockholder annually, the "contract price" for the twelve and one-half millions cubic feet of gas furnished to the city. It thus conclusively results that the language of the statute "free of charge," when considered in connection with the requirement that the city shall make this transfer of stock to the gas company, is intended to be read and should be understood as "free of other and further charge for the expense of manufacture and delivery of said gas, than the compensation already provided by the yearly dividends to be paid to the stockholders of said company upon the 698 shares of stock transferred to said company under the statute." It was for this consideration that the gas company undertook to furnish annually a certain quantity of gas free of charge for its manufacture, but not free of any internal revenue tax the United States Government might thereafter impose upon the consumer, and require to be first advanced by the manufacturer. Such a tax was not, up to that date, known in this country, and was not in the contemplation of the legislature in passing the act, nor of the contracting parties in accepting the legislation as a contract binding upon them. There should be some affirmative proof that the contract was to exempt the city from internal revenue taxation, before a right expressly conferred by statute is to be denied, and the policy of Congress to tax the consumer set aside. The tax is not exacted from the city as a payment to the company for gas furnished, but as a reimbursement of a tax upon the consumer, which has been advanced under law by the gas company; and is by the terms of the law outside of and independent of the contract.

That the jurisdiction of this court over this case can be questioned, it seems difficult to conceive. In the suit of Owings vs. Norwood, lessee, Chief Justice Marshall said: "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the State; and whoever may have the right, it is to be protected." The rule is of course the same as to a right growing out of a statute of the United States. In Williams vs. Norris, 12 Whea. 117, the language is: "It is not sufficient that the construction of the statute is drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute."

In Montgomery vs. Hernandez, Ib. 129, it is declared: "The court has no appellate jurisdiction from the final judgment of a State court in a suit where is drawn in question the construction of a statute or a commission held under the United States, unless some title, right, privilege, or exemption under such statute, &c., be specially set up by the party and the decision be against the claim so made by him."

In Murdock vs. the city of Memphis, 20 Wall. *erratum*, p. 686, the rule is stated thus: "Where an act of Congress calls into operative effect a provision in a deed in virtue of which provision thus called into effect a party claims title and right in such a way that confessedly but for the act no suit would lie, the party so claiming, claims a 'title' and 'right, under' a statute of the United States, within the meaning of the act of February 5, 1867, and if the decision is against the title and right thus set up and claimed, jurisdiction exists here to re-examine."

The right of the plaintiff in error to recover, springs alone from the statute of the United States, and the interpretation placed upon the statute by the Supreme Court of Pennsylvania, denies the right "claimed" in the case

stated, and this claim, this right, and this denial appear upon the record itself.

It is perhaps unfortunate for parties who appear here as plaintiffs in error to the Supreme Court of Pennsylvania, that the practice of that court on affirming a judgment, is to do so without rendering any opinion, since under the statute of 1867 such opinion if rendered, would often be available to declare the interpretation placed upon the statute. But in the present case the denial of the right appears from the record itself, and there is no other local defense which could reasonably be assigned as the foundation for the judgment.

In Curtis' Commentaries, vol. 1, p. 391, the learned author says: "But it has never been held that the record of the highest court must state in terms a misconstruction by that court of the act of Congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an act of Congress and annul a right or title otherwise valid, by reason of such misconstruction."

In Maguire vs. Tyler, 8 Wall. 652, it is ruled: "Where there are several questions in the record, some of local and some of federal jurisdiction, and the judgment or decree is silent as to the ground upon which it is rendered, the jurisdiction will be maintained, if the defenses on the local questions afford no legal answer to the suit. In other words, the court will not presume that the court below decided these local defenses erroneously in order to defeat their jurisdiction."

So in Klinger vs. State of Missouri, 13 Wall., 257: "But where it does not appear on which of the two grounds the judgment was based, then if the independent ground on which it might have been based was a good and valid one sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be pre-

sumed that the State court based its judgment on the law raising the federal question, and this court will then take jurisdiction."

It is impossible to suggest such "good and valid" ground appearing upon this record to sustain the decision. The error is in a false exposition of the act of Congress, or a total denial of its force.

We respectfully submit that this is a case where, under the act of 1867, as declared inoperative in Murdock vs. city of Memphis, *supra*, this court should reverse the judgment, and "render such judgment here as the State court should have rendered."

Respectfully submitted,

CHARLES A. RAY,
EDWARD A. NEWMAN,
*For Plaintiff in Error.*

IN THE

# Supreme Court of United States.

**THE PITTSBURGH GAS COMPANY,**

***Plaintiffs in Error, and below.***

VS.

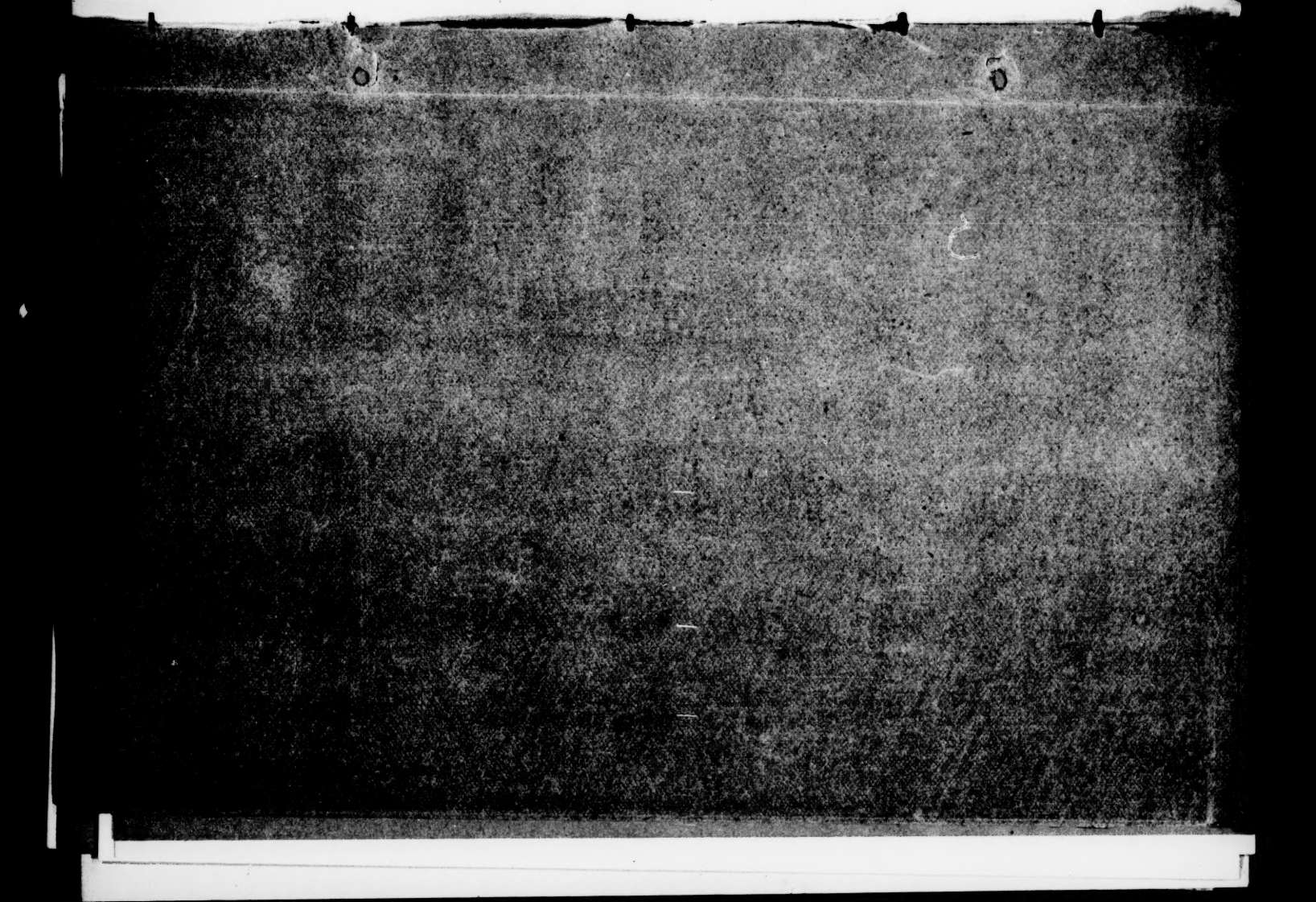
**THE CITY OF PITTSBURGH,**

***Defendants in Error, and below.***

PAPER BOOK OF DEFENDANTS IN ERROR.

GEORGE SHIRAS, JR,

*Attorney for Defendant in Error.*



—IN THE—

# Supreme Court of the United States.

## THE PITTSBURGH GAS COMPANY,

*Plaintiffs in Error, and below.*

## THE CITY OF PITTSBURGH,

*Defendants in Error, and below.*

## ARGUMENT FOR DEFENDANTS IN ERROR.

By authority of an Act of Assembly of the Commonwealth of Pennsylvania, approved January, 31, 1860, the City of Pittsburgh entered into a contract with the Pittsburgh Gas Company, by which said company agreed to furnish to said city 12,500,000 feet of gas "*free of charge.*" The agreement is clear, distinct, and unambiguous, and contains no exception or proviso by which the contract is to be varied upon any contingency which might enhance the cost of production. If the company should reduce the cost of production below the cost at that time, it was to their advantage, if it was increased by an advance in the price of coal or labor, or in any other manner, it was at their risk. Their agreement was *absolute*, to furnish so much gas *free of charge*. The company now endeavor to impose upon the city a charge of twenty-five cents for each thousand feet, amounting to the annual sum of $3,250, being the amount of tax assessed by the United States. The right to do so is based upon the Acts of Congress levying taxes upon gas companies. The first question which arises is: Do the provisions of the Acts of Congress cover this case?

Such an extraordinary claim should be supported by direct and unequivocal authority. The Acts of Congress, after fixing the rate of tax, provides that "all gas companies whose price is fixed by law, are authorized to add the tax herein imposed to the price per thousand feet on gas *sold;* and all such companies which have heretofore contracted to furnish gas to municipal corporations, are in like manner authorized to add such tax to such contract *price.*"

These provisions both relate to contracts for the delivery of gas for a fixed price, but do not in words cover an agreement such as was made between the parties in this case, by which it was to be furnished free of charge. No greater effect should be given to this Act than its terms clearly demand.

Granting that the Act of Congress applies to this case, has it any legal effect? We must admit the principle, that when an Act of Congress is passed in pursuance of the authority conferred upon them by the Constitution, which conflicts with an Act of Assembly of any State, the State law must yield; but we are not aware that it has ever been held that Congress may, with or without reason, annul an Act of the State Legislature regulating its own corporations, or that they may alter or vary a contract solemnly entered into by individuals or corporations capable of making their own agreements.

In this case, the contract has not only the sanction of the parties, but is made a part of the Act of Assembly, re-organizing the Pittsburgh Gas Company. It would scarcely be contended that the legislature of the State could alter or vary the contract, or impose any condition or burthen not contained in the Act of Assembly, or the agreements of the parties. They would be confronted by the section of the Constitution of the United States, which prevents any State from impairing the obligation of contracts; and though no such restriction is placed upon the Federal Government, it was only because it was unnecessary. The Federal Government being one of limited powers, only possesses those powers which were expressly granted, and it has never been supposed that they had, either expressly or by implication, the power to impair, alter, or vary contracts made under the laws of any State. To add a condition to a contract never anthorized by the parties, would in effect be to make a new contract, which is not in its nature legislative. *Sharpless vs. Philadelphia*, 9 *Harris*, 165.

It will not do to say that the imposition of the tax could not be foreseen, and that therefore Congress had the right to provide that its burthens should not fall upon the producers. It could not be foreseen that the price of labor would be twice as much as it was in 1860, that the price of coal should increase from three to eight cents per bushel, or that other matters should change so as to in-

crease the cost of production. When the plaintiffs made their agreement they necessarily accepted all such contingencies, and must abide by them.

But, it is contended that the Act of Congress imposes the tax upon the consumers, and makes the companies collectors. That this is not so is apparent from several considerations. The entire Act places the tax upon the producer,—to him and him alone the Government looks for payment, without abatement for uncollected bills, bad debts, or other deductions. The tax is not uniform, but is graduated according to production, ranging from ten cents to twenty-five cents per thousand, the larger sum being assessed upon the largest production. The only reason for this is that the larger the amount of production the greater the profits to the company. If it were intended to make this a tax upon the consumer, there could be no reason why the tax should not be uniform. There could be no valid reason why the citizens of New York and other large cities should be taxed twenty-five cents, and the citizens of smaller towns only ten cents per thousand. The tax is clearly imposed upon the companies, and the provision for adding it to the bills of consumers was evidently an afterthought, and inserted in the Act to prevent what Congress supposed might be a hardship upon the companies. We submit, that they exceeded their authority in thus providing for relief against the hardship of acts of the State, or contracts of parties.

The judgment of the Court below was affirmed by the Supreme Court of Pennsylvania by a *per curiam* and hence it is not possible to furnish to this Court the reasons at length upon which the affirmance was based. It is submitted, however, that for the reasons herein briefly stated the judgment of the Supreme Court of Pennsylvania should be affirmed.

GEORGE SHIRAS, JR,
*Attorney for Defendant in Error.*